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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ANTONIO T. RANGEL, Plaintiff and Appellant, v. MELVIN WILLIAMS, Defendant and Respondent.	B163214 (Los Angeles County Super. Ct. No. PC028291)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Farrell, Judge. Affirmed.

Law Office of Brian Ghiglia, Brian Ghiglia; Law Office of Bruce Adelstein and Bruce Adelstein for Plaintiff and Appellant.

Horvitz & Levy, David M. Axelrad, Wendy S. Albers; Early, Maslach & Rudnicki and Andrew M. Rudnicki for Defendant and Respondent.

BACKGROUND

Plaintiff Antonio T. Rangel was injured in an attack by three dogs owned by defendant Jeffrey James Castaneda. Rangel was walking through an alley when Castaneda's three boxer dogs, Gypsy, Bear, and Baby, apparently escaped through a hole in a wall along the back of Melvin Williams's property and attacked him. Rangel had walked through the alley nearly every day for 14 years without incident. Castaneda had lived in the house for at least four years and had owned at least one dog for over three years.

Rangel sued Castaneda and his landlord, Williams, for negligence and strict liability.[1] The trial court granted summary judgment for Williams, finding Rangel's evidence insufficient to raise a triable issue of material fact regarding Williams's actual knowledge of the vicious propensity of the dogs. We affirm.

Judgment was entered for Williams. This timely appeal followed.

DISCUSSION

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 334.) "In ruling on the motion, the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citations], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843.)

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[1] Castaneda is not a party to this appeal. Rangel abandoned the strict liability claim against Williams who did not own the dogs.

The parties do not dispute that Williams was Rangel's landlord. A landlord can only be liable for an attack by a tenant's dog if two requirements are met. He must first have actual knowledge of the dog's vicious propensity. (*Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, 1838.) Second, the landlord must have the ability to prevent the foreseeable harm or the right to remove the dog from the property. At issue in this case is the requirement of actual knowledge. (*Id.* at p. 1838.)

The landlord's actual knowledge may be proven by direct evidence or may be inferred from circumstantial evidence that the landlord *must* have known about the dangerousness. (*Donchin v. Guerrero, supra*, 34 Cal.App.4th at p. 1838.) Evidence that the landlord *should* have known about the dangerousness is insufficient, although it may suffice to prove constructive knowledge. (*Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 514, fn. 4.) "Because the harboring of pets is such an important part of our way of life and because the exclusive possession of rented premises normally is vested in the tenant, we believe that actual knowledge and not mere constructive knowledge is required." (*Id*. at p. 514, italics & fn. omitted.)

As the party moving for summary judgment, Williams bore the initial burden of demonstrating that a duty could not be established. (See Code Civ. Proc., § 437c, subd. (o)(2).) If Williams satisfies his burden of production, Rangel must make a prima facie showing that a triable issue of material fact exists regarding the issue of duty. (See *Aguilar v. Atlantic Richfield Co*., *supra*, 25 Cal.4th at p. 850.)

Williams offered as an undisputed fact that he had no actual knowledge that the dogs had bitten anyone besides Rangel. In particular, Williams testified at deposition that he did not receive any complaints or reports of Castaneda's dogs

biting anyone and he never had a concern that the dogs might bite anyone, before the incident at bench. This evidence was sufficient to meet the prima facie burden.

Williams correctly points out that none of Rangel's evidence directly establishes that Williams actually knew the dogs were dangerous. This includes the declarations and testimony regarding prior incidents where the dogs bit a mail carrier and another person, and testimony that the dogs barked loudly and growled at people. Nevertheless, as we have explained, a jury is permitted to infer actual knowledge from circumstantial evidence that Williams knew about the danger. Rangel infers actual knowledge by relying on Williams's deposition testimony and the declaration of a canine behavioral expert.

Williams testified that he visited the property on two or three occasions where the dogs would bark until the Castanedas came out of the house, he walked by the property eight to ten times and drove by it more than five times a month over the course of three to four years. Williams could not recall if the dogs lunged at the fence or growled at him.

Canine behavioral expert, Ronald Berman, declared that he reviewed numerous discovery documents, the moving papers, and Rangel's medical records. He also visited the scene and interviewed one of Rangel's neighbors. Berman provided three opinions in his declaration. First, he concluded that two of the dogs were full blooded boxers and one appeared to be a boxer mix. Second, Berman stated that the dogs "habitually demonstrated dangerous and or vicious propensities" before the incident. He explained, "Barking and jumping are not necessarily aggressive behaviors but coupled with directly aggressive behaviors such as lunging, growling and snarling they have a different quality and a different meaning. During such an agitated state, especially when the dog has a direct intention to bite someone . . . as one of the dogs had demonstrated prior to this incident in an attack on a postal carrier . . . barking and jumping become an

expression of the intensity of the dogs[’] aggression level,” and a channel for releasing aggression where the dog has no chance to release it at the intended target.

Third, Berman concluded that Williams “must have known of the dangerous and or vicious propensities of one or more” of Castaneda’s dogs before the incident. Berman explained, “Dogs are creatures of habit. Behaviors that they typically display become ritualized and are then expressed automatically in specific situations like greeting their owners or encountering strangers on or near their territory. Barking, running in circles, jumping, growling, running along a fence line, lunging, snarling and biting at the fence are behaviors that commonly become ritualized, especially when dogs have the opportunity to [re-enforce] the behavior through many trials. Gypsy, Bear and Baby were kept behind a chain link fence directly adjacent to a public street. Every person passing by either on their street or [across] the street would have been a direct stimulus for any and all of these behaviors adding up to potentially thousands of trials over the time that they were at that address. As a result their ritualized behaviors would have been highly developed and quite predictable. Five witnesses have testified or stated under penalty of perjury that they personally experienced these dogs, especially Gypsy, growling, snarling, lunging and jumping at the fence when people passed by either on their side of the street or on the opposite side of the street. Three of these witnesses experienced these specific behaviors on as many as 50 or more occasions. Two more witnesses, both trained and experienced animal control officers have testified that they witnessed these same behaviors consistently at their facility and rated Gypsy as an 8 and a 10 out of a possible 10 on a scale of aggression.”

“It is my professional opinion based on the evidence I have reviewed that Gypsy, especially, but Bear and Baby as well, demonstrated dangerous and vicious

propensities in a ritualized fashion whenever a person entered their perceived territory which extended from their fence line all the way across the street and that they would have reacted to any unknown person with those same behaviors when that person came within range. Since Melvyn L. Williams has testified that he has come into that range on 11-13 occasions including 2 times that he actually visited Mr. Castaneda when the dogs were loose in the yard and went directly to the fence as well as 8-10 other times when he passed by the house on foot[,] [i]t is my opinion that it is highly probable that he would have elicited the same ritualized reaction that Gypsy, Bear and Baby demonstrated towards other people. Either as an unknown visitor or passerby, it is my opinion that Mr. Williams must have witnessed those behaviors and that he must have known of the dangerous and or vicious propensities of one or more of the dogs living at 13326 Pinney Street."

Rangel reasons that given the above evidence, Williams must have known that the dogs were dangerous. He analogizes to *Donchin v. Guerrero*, *supra*, 34 Cal.App.4th at page 1843. *Donchin*, however, is distinguishable due to the unique circumstances of that case, in which the landlord gave a false exculpatory statement. The appellate court specifically stated that the inference of guilty knowledge derived from the landlord's false exculpatory statement was the "more persuasive" evidence in the case. (*Id*. at p. 1840.) At bench, unlike in *Donchin*, there was no false exculpatory denial.

The *Donchin* court "bolstered" its ruling that the landlord's denial of actual knowledge was unbelievable with circumstantial evidence that he must have known about the dogs' propensities. (*Donchin v. Guerrero*, *supra*, 34 Cal.App.4th at p. 1843.) The evidence consisted of testimony by two disinterested witnesses (a neighbor and a UPS courier) that they often saw the dogs display dangerous behavior; an admission by the landlord that he played with the dogs once a month when he came to collect the rent; and the opinion of an animal behaviorist who

reviewed the other evidence in the case and concluded that if the dogs were aggressive and the landlord visited with them monthly, he would "'undoubtedly'" have witnessed aggressive behavior from the dogs. (*Id*. at pp. 1843-1844.)

As in *Donchin*, Rangel proffers the declaration of a canine behavioral expert. The *Donchin* court's reliance in part on a canine expert's declaration to create a triable issue of material fact regarding the landlord's actual knowledge of the dog's vicious nature, does not require a finding that Berman's declaration is sufficient to create a triable issue of material fact in this matter. As explained above, the declaration was not the main evidence relied upon in *Donchin*. (*Donchin v. Guerrero, supra*, 34 Cal.App.4th at p. 1843.)

Moreover, the trial court properly sustained Williams's objection to Berman's speculative conclusion that Williams must have known the dogs were dangerous. "[A]ctual knowledge can be inferred from the circumstances only if, in the light of the evidence, such inference is not based on speculation or conjecture." (*Uccello v. Laudenslayer*, *supra*, 44 Cal.App.3d at p. 514, fn. 4.) Speculative inferences have no place in summary judgment. (See *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.) "An issue of fact can only be created by a conflict of evidence. It is not created by 'speculation, conjecture, imagination or guess work.' [Citation.] Further an issue of fact is not raised by 'cryptic, broadly phrased, and conclusory assertions [citation] or mere possibilities [citation].' 'Thus, while the court in determining a motion for summary judgment does not "try" the case, the court is bound to consider the competency of the evidence presented.' [Citation.]" (*Sinai Memorial Chapel v. Dudler* (1991) 231 Cal.App.3d 190, 196-197.) Rangel contends that, because the neighbors had observed the dogs habitually behaving aggressively as set forth in Berman's declaration, this is sufficient circumstantial evidence to infer that Williams must also have observed the dogs' aggressive behavior. But Berman's statements about

the dogs' past aggressive behavior toward others is pertinent because of his expertise. The same expertise has not been shown to be possessed by Williams. Thus Berman's declaration is insufficient to demonstrate that Williams knew of or appreciated why the dogs may have had vicious propensities. We find that the circumstantial evidence within Berman's declaration made without personal observation of the dogs merely provides speculative support and failed to create a triable issue of material fact.

Because a reasonable trier of fact could not infer Williams actually knew that Castaneda's dogs were dangerous, Williams owed no duty to Rangel. Absent a duty of care, the negligence cause of action is unmeritorious. Accordingly, the trial court properly granted Williams's motion for summary judgment.

DISPOSITION

The judgment is affirmed.

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CURRY, J.

I concur:

HASTINGS, J.

EPSTEIN, Acting P.J.

I respectfully dissent, for it is clear to me that a triable issue of material fact exists as to whether the defendant knew of the vicious propensity of his tenant's dogs. There is no dispute but that the evidence supports the inference that in fact, the dogs had that propensity. The evidence also is ample that the dogs reacted to the presence of strangers in the vicinity of the rented premises by barking, running in circles, jumping, growling, and lunging at the fence proximate to the stranger. There is no doubt that a person seeing that kind of acting out would believe the dogs would attack if they could. The principal contested issue in this case is whether the defendant knew of this behavior. He said that he did not; that he recalled no instance during his several visits to the premises when the dogs behaved in this manner. If his testimony is believed, then judgment must be in his favor since, as the majority point out, mere negligent failure to be aware of a vicious propensity is insufficient to fix liability on a landlord.

It also is true that there is no evidence that anyone told the defendant of previous occasions in which the dogs managed to attack strangers. But there is substantial, nonspeculative evidence from which a trier of fact could infer that the defendant knew of the dogs' vicious propensity. Plaintiff presented the declaration of Ronald Berman, a qualified canine behavior expert, who stated that dogs "are creatures of habit" and the behavior they display, such as the growling, snarling and lunging in this case, "commonly become ritualized," and that it is likely that they so behaved when the defendant was at the residence. Habit is simply a "regular response to a repeated specific situation." (1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 67, p. 404.) The basis of habit evidence is that a person (or an animal) who regularly responds in the same way to a specified

stimulus does so whenever that stimulus is presented. In this case the stimulus was the presence of a stranger in the vicinity of the residence at which the dogs were kept. The inference is that the dogs displayed their viciousness in the presence of defendant when he visited the premises.[1] He said he recalled no such behavior. But a trier of fact could reasonably conclude otherwise, choosing to believe that the defendant is mistaken or untruthful. Whether the trier would reach that conclusion is not for us to decide. The plaintiff was entitled to have the trier make that decision. He was deprived of that right by the summary judgment. For these reasons, I would reverse the judgment.

EPSTEIN, Acting P. J.

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[1] In the penultimate paragraph of its Discussion, the majority say that "Berman's statements about the dogs' past aggressive behavior toward others is pertinent because of his expertise" and hence insufficient to demonstrate that defendant knew or appreciated why the dogs may have had vicious propensities. This misses the point. The significance of Berman's declaration is that the dogs always reacted with a display of their vicious propensities when the stimulus of a stranger in the area was presented. That raises a triable issue of material fact that they did so when defendant was at the premises.

The majority ends this passage with a finding that "the circumstantial evidence within Berman's declaration made without personal observation of the dogs" by him (I assume) "merely provides speculative support and failed to create a triable issue of material fact." It is not necessary for Berman, a canine behavior expert, to have personally observed the dogs, assuming that this was still possible. His opinion is based on admissible evidence of others who did observe them. The conclusion he reaches does more than merely provide "speculative support." Together with the other evidence, it "connects the dots" and raises a triable issue of material fact.